

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

<b>STATE OF WASHINGTON,</b>	)	<b>No. 23510-6-III</b>
	)	
<b>Respondent,</b>	)	
	)	
<b>v.</b>	)	<b>Division Three</b>
	)	
<b>BEN ALAN BURKEY,</b>	)	
	)	<b>UNPUBLISHED OPINION</b>
<b>Appellant.</b>	)	

**KULIK, J.**—Ben A. Burkey asserts he unwittingly possessed methamphetamine. He put on a shirt from a communal basket of clothing. He denied knowing there was methamphetamine in the shirt pocket. He presented no other evidence of unwitting possession. Mr. Burkey did not meet his burden of proving unwitting possession and sufficient evidence supports the conviction. We affirm.

**FACTS**

In March of 2004, Ben A. Burkey’s probation officer arrested Mr. Burkey for a probation violation. The officer booked Mr. Burkey into the county jail. Several officers searched Mr. Burkey. During the search, officers found methamphetamine in Mr.

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Burkey's shirt pocket. Mr. Burkey was charged with possession of a controlled substance – methamphetamine.

At trial, Mr. Burkey raised the defense of unwitting possession. He claimed he had no knowledge that there was methamphetamine in his shirt pocket. Mr. Burkey explained that he was living with friends as a result of his divorce and that the shirt he was wearing came from a communal basket of laundry. Mr. Burkey testified that he was surprised when an officer informed him that they found methamphetamine in the shirt. The trial court also instructed the jury regarding the defense of unwitting possession.

The jury found Mr. Burkey guilty. He was sentenced to 18 months confinement. This appeal followed.

### **ANALYSIS**

In reviewing the sufficiency of the evidence, this court must determine whether, after viewing all of the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A criminal defendant claiming insufficiency of the evidence admits the truth of all of the State's evidence, along with any reasonable inferences in favor of the State that may be drawn therefrom. *Id.* However, "credibility determinations are within the sole province of the jury and are not subject to review." *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). And a jury is further permitted

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to infer a mental state or intention based on the circumstances of the case. *Id.*

There is no mens rea element to a charge of mere possession of a controlled substance. *State v. Bradshaw*, 152 Wn.2d 528, 532-33, 98 P.3d 1190 (2004) *cert. denied*, *Bradshaw v. Washington*, 544 U.S. 922, 125 S. Ct. 1662, 161 L. Ed. 2d 480 (2005). As such, the State is required to prove only two elements – that the substance was a controlled substance and the defendant possessed it. *Bradshaw*, 152 Wn.2d at 538.

Here, the State presented witnesses who testified that a substance was found in the pocket of the shirt that Mr. Burkey was wearing, and that the substance in the pocket was found to be methamphetamine. As a result, a reasonable juror could find that the State proved both elements of the charge of possession of a controlled substance.

While there is no knowledge requirement to be convicted of possession of a controlled substance, unwitting possession is a defense to this charge. *State v. Staley*, 123 Wn.2d 794, 799, 872 P.2d 502 (1994). Unwitting possession applies as an affirmative defense when the defendant either did not know that he was in possession of the controlled substance or did not know the nature of the substance that he possessed. *Id.*

Here, Mr. Burkey claimed that he did not know he was in possession of the methamphetamine in the pocket of his shirt. He asserts that his testimony established his unwitting possession, and that the State presented insufficient evidence of his guilt.

This argument is without merit. The defense of unwitting possession does not negate an element of possession of a controlled substance, this defense simply excuses otherwise unlawful conduct. *See State v. Wiley*, 79 Wn. App. 117, 123, 900 P.2d 1116 (1995). As such, even if the defense were established by a preponderance of the evidence, this fact would not affect the sufficiency of the evidence demonstrating that Mr. Burkey was in possession of a controlled substance.

Significantly, a defendant who establishes unwitting possession cannot be criminally punished for what would otherwise be an unlawful act. *City of Kennewick v. Day*, 142 Wn.2d 1, 11, 11 P.3d 304 (2000). “Such a provision ameliorates the harshness of the almost strict liability our law imposes for unauthorized possession of a controlled substance.” *State v. Cleppe*, 96 Wn.2d 373, 380-81, 635 P.2d 435 (1981). The burden of proving unwitting possession is on the defendant. *Id.* at 381.

Mr. Burkey had the burden of persuading the jury that the possession was unwitting. It is apparent from the jury verdict of guilt that this did not occur. The only evidence that the possession in this case was unwitting was the defendant’s testimony. Whether the jury chose to believe this testimony hinged on the jury’s determination of credibility. This court will not disturb a jury’s credibility determination. *Myers*, 133 Wn.2d at 38. The jury’s verdict was otherwise supported by substantial evidence.

We affirm.

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A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, J.

WE CONCUR:

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Sweeney, C.J.

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Schultheis, J.